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DECISION



Crowley
P.L. II

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190101

DATE: March 30, 1978

MATTER OF: X-Tyal International Corp.

DIGEST:

1. Contracting officer may determine a bidder to be nonresponsible despite a favorable preaward survey where other information before contracting officer indicates that a negative determination is warranted.
2. Contracting officer's use of urgency exception to Certificate of Competency procedure, as provided by Armed Services Procurement Regulation (ASPR) 1-705.4(c)(iv), is sustained. However, GAO requests views of Executive Branch as to whether continued use of urgency exception is justified in view of 1977 amendments to Small Business Act.

X-Tyal International Corp. (X-Tyal) protests the determination that it was nonresponsible and therefore not eligible for the award of a contract under invitation for bids (IFB) N00'04-77-B-0191 issued by the Navy Ship Parts Control Center, Mechanicsburg, Pennsylvania (Navy). As a result of the determination of nonresponsibility as to X-Tyal, the agency made award to another bidder.

The IFB, issued April 29, 1977, solicited bids for marine fenders, covering orders to be placed from May 31, 1977 through May 30, 1978, with deliveries 185 days after orders are placed. Two bids were received by the May 20, 1977 bid opening date. X-Tyal submitted the low bid. Following bid opening, the contracting officer requested a preaward survey of X-Tyal. The preaward survey dated June 14, 1977, contained a recommendation that award be made to X-Tyal. However, the contracting officer believed that the favorable recommendation was not adequately supported, and on June 28, he requested additional information from the preaward survey team as to X-Tyal's contract experience.

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The contracting officer's request for additional information was prompted by delivery problems under a contract for the same item for which X-Tyal was the production subcontractor. That contract, with Revere Supply Company, had called for deliveries to be completed by February 3, 1976. It appeared, however, that because of certain problems not attributable to the contractor, including a fire at the X-Tyal facility which caused it to move its plant to a new location in June 1977, X-Tyal proposed to Revere a revised schedule calling for delivery by August 1, 1978, to which the Government agreed.

The contracting officer reports that, despite the Government's acceptance of the revised delivery schedule, efforts have been made by the Government to encourage X-Tyal to expedite delivery under the Revere contract, because the supply situation for marine fenders has become critical. These efforts have not been successful. In this regard, it is reported that on June 3, 1977, Revere filed a petition for reorganization under chapter 11 of the Bankruptcy Act.

The contracting officer reports that the additional information received by him showed that X-Tyal's total Government business consisted of 11 contracts, including the Revere contract, of which 7 contracts were delinquent. Moreover, it appeared that there was a disruption in X-Tyal's production capacity due to a labor strike at its plant which started late June 1977 and ended August 22, 1977.

On August 22, the contracting officer determined X-Tyal to be nonresponsible on the basis that it could not deliver the urgently needed items within the required time frame. At the same time the contracting officer determined the second low bidder, Vibration Isolation Products, to be responsible, and he concluded that award should be made to that bidder without delay and without referral of X-Tyal's nonresponsibility determination to the Small Business

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Administration (SBA) for processing under the Certificate of Competency (COC) procedures. In accordance with Armed Services Procurement Regulation (ASPR) 1-705.4(c)(iv) (1976 ed.), approval of the contracting officer's proposed action was obtained from higher authority within the agency and SBA was subsequently notified of the circumstances, including the award to Vibration, which was made on September 2, 1977.

X-Tyal argues that the contracting officer's determination of nonresponsibility was arbitrary. X-Tyal explains that its refusal to expedite delivery on the Revere contract was caused by its concern over the prime contractor's ability to pay for such deliveries. It insists that its actions under the Revere contract were dictated by prudent business practice and should not have been considered as reflecting on its capacity to deliver marine fenders to the Government. As proof of its capacity to deliver, X-Tyal points to the preaward survey report which concluded that X-Tyal does have the capacity to perform the instant contract in a satisfactory manner. As to disruptions in its production capacity caused by the fire and the labor strike, X-Tyal states that these problems have been resolved and that modifications were eventually received on its existing contracts extending the delivery schedules because of excusable delay. It believes that the contracting officer should have accepted the favorable recommendation of the preaward survey team, and asserts that his refusal to do so was arbitrary.

In addition, X-Tyal disputes the contracting officer's determination to make award to the next low bidder without referral of X-Tyal's responsibility to SBA. It questions why the contracting officer took from June 14 to August 22 to make a determination of nonresponsibility, on an affirmative preaward survey, if the items were so urgently needed.

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At the outset we note that the matter of responsibility, as used in Government procurement, refers to whether a prospective contractor is able to perform a particular contract for the Government. A bidder is not eligible for the award of a Government contract unless the contracting officer affirmatively determines that the bidder is responsive. ASPR 1-902 (1976 ed.).

In making his determination of responsibility a contracting officer is, of course, entitled to rely on the recommendation of his preaward survey team. Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127. As the protester recognizes, however, the contracting officer is not required to do so. A contracting officer may determine a bidder to be nonresponsive, despite a favorable preaward survey, where other information before him indicates that a negative finding determination is warranted. B-167686, October 14, 1969; B-165562, January 6, 1969. So long as the contracting officer has a reasonable basis for determining a bidder to be nonresponsive, we will not question that determination. See 45 Comp. Gen. 4 (1965).

We think that the contracting officer's determination in this case had a reasonable basis. It may be, as X-Tyal states, that its refusal to agree to expedite delivery under the Revere contract was caused by Revere's financial condition rather than by an inability to produce at a faster rate. It also may be the case that X-Tyal has resolved its problems and is able to undertake additional work. However, as seen by the contracting officer at the time of his determination, X-Tyal had recently moved to a new facility, had undergone a labor strike at the new facility which just ended, and was delinquent on a majority of its Government contracts. Considering that the items called for were urgently needed, due

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in part to delivery delays under the Revere contract, we believe the contracting officer could reasonably conclude that X-Tyal was nonresponsible.

Moreover, we cannot say that the contracting officer took too long to decide X-Tyal's responsibility. The contracting officer states that the preaward supplemental report, which is dated July 16, 1977, was actually received July 26, 1977. Thereafter, the contracting officer explains, he was in contact with the preaward survey monitor several times from July 26 to August 22, in order to determine whether a schedule of production could be forecasted for X-Tyal because of the strike. He states that as late as August 16, 1977, X-Tyal refused, or was unable, to give monthly forecasts of production. He further states:

"The contracting officer then moved on the basis of the urgency. The basic problem was where and from whom could we get the fastest delivery. X-Tyal imposed that decision by failing to give monthly production forecasts."

We see no reason to fault the contracting officer for delay in reaching his determination. It appears to us that the contracting officer wanted to give X-Tyal the opportunity to show that it could deliver on time but that X-Tyal was unable or unwilling to furnish the information requested by the contracting officer.

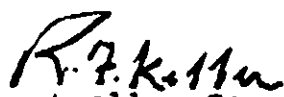
With regard to the urgency determination, the record shows that by August 22, 1977, the agency had to have these items as soon as possible, because of the undelivered items under the Revere contract (which itself had been negotiated as an urgent procurement). In light of Revere's shaky financial

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condition, the conclusion was reached that a prompt award to Vibration was justified to assure delivery in the relatively near future. Consequently, award was made to Vibration and it is reported that the company is attempting to expedite delivery. Given the circumstances, we believe the contracting officer's actions were consistent with ASPR 1-705.4(c)(iv). Cal-Chem Cleaning Company, Incorporated, supra.

For the above reasons, the protest is denied.

We note, however, that section 501 of the Small Business Act Amendments of 1977, Pub. L. 95-89, 91 Stat. 557, effective August 4, 1977, provides that no small business concern may be precluded from award because of responsibility without a referral of the matter to SBA for a final disposition under the COC procedures. In light of section 501, we have some question as to whether continued use of the urgency exception in ASPR 1-705.4(c)(iv) is justified. Therefore, we are asking the Department of Defense, the Office of Federal Procurement Policy and the SBA for their views on this matter for purposes of future procurements.


Deputy Comptroller General
of the United States